No. 16005

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant.

vs.

OREN E. CUMMINS,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdictional Statement.

Jurisdiction of the District Court is based on 28 U. S. C. 1346(a)(2) and this Court has jurisdiction under 28 U. S. C. 1291.

Statement.

On October 18, 1954, Appellee Oren E. Cummins made application for retirement under Section 1(d) of the Civil Service Retirement Act, 5 U. S. C. 691(d) (1952 Ed.). It is not disputed that Appellee had satisfied the length of service and age requirements for such retirement, in fact, neither the Secretary of the Treasury nor the Civil Service Commission gave any consideration to such matters. Nor did either the Secretary of the Treasury or the Civil Service Commission consider "the degree of

hazard to which such officer or employee is subjected in the performance of his duties." On the contrary, on February 7, 1955, the Secretary of the Treasury, by his delegate, informed Appellee as follows:

> "This refers to your letter concerning your eligibility for retirement under Section 1(d) of the Retirement Act.
>
> The Treasury Department negotiated with the Civil Service Commission a list of positions approved for inclusion under Section 1(d). The duties of such positions had to be within the scope of standards furnished by the Civil Service Commission. The position of Internal Revenue Agent, GS-512, in the Audit Division [80] has not been approved for coverage; the position of Special Agent (Tax Fraud), GS-1811, in the Intelligence Division is, however, covered.
>
> As you requested, I am enclosing a list of the positions which have been approved by the Civil Service Commission." [R. 22-23, 139.]

The position of Internal Revenue Agent, GS-512, in the Audit Division is the grade which was occupied by Appellee. The position of Special Agent (tax fraud), GS-1811 in the Intelligence Division is one of the "covered positions." [R. 24.]

In a letter dated April 5, 1955, the Secretary of the Treasury, by his delegate, informed Appellee as follows:

> *"It is mandatory that an employee occupy a position approved for coverage under Section 1(d)* at the time he retires in order to have his annuity computed under its provisions. If an employee occupying a covered position needs time spent on detail

from an uncovered position to a covered position to make up the necessary twenty years, such time spent on detail is creditable if properly documented.

Since the position of Internal Revenue Agent, which you occupied at the time you retired, is not approved for inclusion under Section 1(d), you are not, in any case, eligible to have your retirement annuity computed under the provisions of this Section. I am sorry, but we are unable to take any action in your case." (Emphasis supplied.) [R. 24-25, 140.]

In a letter dated March 2, 1955, the Civil Service Commission informed Appellee as follows:

"The office of the Regional Commissioner for the Internal Revenue Service informs us that at the time of your retirement *you were not occupying a position which was approved for inclusion under Section 1(d) of the Retirement Act,* and that no recommendation could therefore be made for your retirement under this Section.

Under the circumstances there is no authority for your retirement under Section 1(d) of the Retirement act." (Emphasis supplied.) [R. 25.]

The reason, and the sole reason, given by the Secretary of the Treasury and the Civil Service Commission for refusing Appellee's retirement under Section 1(d), was that *he was not classified in a position approved for inclusion under Section 1(d).* No consideration was given to Appellee's personal qualifications for retirement under Section 1(d) but refusal of retirement was predicated entirely on the ground that Appellee was not *classified* in a position where he could be *considered* for retirement under Section 1(d).

Statute Involved.

The statute involved is set out in Appellant's Brief at pages 4-5. We take the liberty of quoting here the last sentence of that section:

> "In making such determination, the Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such officer or employee."

Summary of Argument.

Appellee contends it was an error of law for the Secretary of the Treasury and the Civil Service Commission to refuse him retirement under Section 1(d) for the reason that his class of position *was not listed* among those negotiated between the Secretary of the Treasury and the Civil Service Commission. Among the letters informing Appellee of the basis for refusing retirement, was one dated February 7, 1955 (*supra,* p. 2) to which the list of "approved" positions was attached. Appellee maintains that the negotiations between the Secretary of the Treasury and the Civil Service Commission concerning such a listing as well as the promulgation of the list, were in direct defiance of legislative command. The wording of Section 1(d) of the Retirement Act makes it abundantly clear that retirement is not to be determined in any case by giving consideration to the class of the position held by the employee. On the contrary, his retirement is to be decided upon the basis of the duties he performed.

ARGUMENT.

The Secretary of the Treasury and the Civil Service Commission Negotiated a Classification of "Covered" Positions in Defiance of Congressional Mandate.

As Appellant has stated in its Brief, the forerunner of Section 1(d) of the Retirement Act was PL-168. (App. Br. 10.) This section applied only to employees of the Federal Bureau of Investigation. Subsequent to the passage of the section, which provided for special benefits for employees of the Federal Bureau of Investigation, the Treasury Department and other departments of the Government indicated to the Congress that they felt it was unfair to give such preference to enforcement officers in only one branch of the Government. When broader legislation was later being considered by the Congress, the Treasury Department took the view that its enforcement officers should be given the same benefits as those employed in the Department of Justice. For example, we find at page 2276 of the United States Code Congressional Service, 80th Cong., 2d Sess., the following statement:

> "Representatives of the Treasury Department pointed out that granting special retirement benefits to law enforcement agents in one agency and not to those in other agencies is discriminatory and inequitable."

At this same time the Acting Secretary of the Treasury wrote to the Congressional Committee and stated among other things:

> "The Department favors granting of the proposed retirement benefits to investigative and law enforcement personnel of any Federal agency which can present justification therefor as the Treasury has always done." (P. 2277.)

We should note that the Civil Service Commission was in agreement with the Treasury views and sent a letter to the Congressional Committee in which it stated:

> "As has been stated on previous occasions, the Commission is not in favor of special legislation for individual groups of employees." (P. 2279.)

The Refusal to Retire Appellee Because He Was in an Unlisted Position Was a Pure Error of Law.

The most significant part of the legislative history of Section 1(d) of the Retirement Act is that two separate drafts of the amendment were submitted to the House Committee by the Chief of the Retirement Division. One of those drafts specified the groups of officers and employees who would be eligible for retirement under the amendment, that is, it provided for retirement on the basis of classifications or titles. The other draft did not specify the titles or the classifications but provided that the amendment should apply to *all* Federal officers and employees whose primary duties involved the investigation, apprehension or detention of persons suspected or convicted of offenses against the criminal laws of the United States. (U. S. C. Congressional Service, p. 2280.) *This latter draft is the one which became Section 1(d).*

Nothing could be clearer than that Congress intended to prohibit the use of a frozen set of classifications of positions. It rejected the draft that set up the qualifications in terms of duties[1] and passed the Bill which specifically said that "in making such determination the

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[1]It is significant that the list in this rejected Bill is strikingly similar to the one later promulgated by the Secretary of the Treasury and the Civil Service Commission [R. 23, 24].

Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties, *rather than the general duties of the class of a position held by such officer or employee.*" (Emphasis supplied.)

Despite this clear mandate from Congress, the Secretary of the Treasury and the Civil Service Commission agreed upon a list of positions which would be covered, and have refused to consider Appellee for retirement because he was not classified under one of the "covered positions." In doing this it is not contended there was an arbitrary determination of facts on the part of the Government officials, because no facts relating to retirement of Appellee were considered. There was merely an error of law in using a list of positions which had been promulgated contrary to legislative enactment. In other words, the Secretary of the Treasury and the Civil Service Commission erroneously interpreted the statute to mean that they could match titles against job classifications to make a mechanical determination of retirement qualifications.

It might be added that while Section 1(d) uses the word "may" in reference to the discretion of Agency officials, there is indication in the legislative history that the Congress intended the provisions to be mandatory. For example, in Senate Miscellaneous Reports, page 1668, 80th Congress, 2d Session, it is stated as follows:

> "The Bill provides that the Head of the Department or Agency *shall* make recommendation to the Civil Service Commission when such officer or employee is entitled to retirement and the Civil Service Commission *shall* determine whether or not he shall receive the benefit." (Emphasis supplied.)

Appellee Has Satisfied All Requirements for Retirement Under Section 1(d) and Is Entitled to a Money Judgment.

We should note again that an Internal Revenue Agent (Special Agent) may be retired under Section 1(d) because he is classified under "Positions Covered by §1(d) Retirement Act" [R. 23, 24] and curiously enough, we find that the "Criminal Assignment Squad, New York" which is part of the internal inspection service of the Treasury Department is classified under the covered positions.

No doubt if thought had been given to inclusion of Internal Revenue Agents of the fraud group, they would have been listed as a covered classification. As the testimony amply proves, an Internal Revenue Agent works jointly with the Special Agent in the investigation of persons suspected of offenses against the criminal tax laws of the United States. Much of the evidence in the case is related to the respective duties of the Special Agent and the Revenue Agent. As we have seen, the Special Agent is classified as being eligible for retirement under Section 1(d) while the Revenue Agent is not. The record makes it patently clear that there is no basis for any such distinction. With respect to the duty to investigate persons suspected of tax crimes there is no evidence that Special Agents are subjected to any greater degree of hazard than Revenue Agents who do only fraud investigations. On the contrary, the only testimony in this regard was to the effect that Revenue Agents were subjected to a greater degree of hazard than the Special Agents. [R. 52, 54, 55, 82, 114, 115, 132.]

At the trial the Government argued that a Revenue Agent could not "primarily" be engaged in the investigation of criminal tax fraud because the Special Agent working with him on the joint investigation was the one primarily engaged in the investigation of tax crimes. As the testimony clearly demonstrates, it is *impossible* under the Treasury Rules and Regulations in force during Appellee's tenure to convict a person for tax evasion without an investigation and report by a Revenue Agent (or deputy collector) in addition to the work of the Special Agent. In every case of criminal tax fraud, a report and computation by a Revenue Agent is necessary before a recommendation of prosecution can be made. As further indication of the Congressional interpretation of the word "primarily" we find the following statement made in a letter from the Chief of the Retirement Division dated April 19, 1948, to the House Committee of Congress. Employees "such as office deputies, marshals and certain post office inspectors" are not considered to be primarily engaged in the investigation of persons suspected of crimes against the United States. (P. 2280, U. S. C. Congressional Service, 80th Cong., 2d Sess.)

As the record shows, there are only a few fraud groups in the United States with considerably fewer than 100 Internal Revenue Agents assigned to such groups. [R. 47.] That is, in only a few offices of the Internal Revenue Service do any of the Internal Revenue Agents work exclusively on fraud cases. Undoubtedly, if the existence of these special fraud groups had been called to the attention of the Civil Service Commission at the time the classifications were set up, the individuals in this group would have been permitted retirement under Section 1(d).

In offices which have no fraud groups, it is customary to have joint investigations conducted by the Special Agents together with regular Internal Revenue Agents. In this way the average Internal Revenue Agent works very few fraud cases. However, Appellee, because of his assignment to the fraud group, was engaged exclusively in the investigation of persons suspected of criminal evasion of tax. [R. 81.]

The only reasonable conclusion we can reach is that the duties of his position were primarily the investigation of persons suspected of criminal tax fraud which entitled him to consideration for retirement under Section 1(d).

Jurisdiction.

Appellant has cited a number of cases which indicate that if this action were in the nature of a writ of mandamus it would have to be brought in the District of Columbia Circuit, since the Secretary of the Treasury and the members of the Civil Service Commission are officials domiciled in the District of Columbia. It is conceded that the United States District Court for the Southern District of California does not have jurisdiction over such administrative officials. This does not mean, however, that officials of these two Departments can erect an iron wall around their determinations which preclude judicial review. Mandamus is not an exclusive remedy.

The question of jurisdiction under the Tucker Act was settled beyond dispute by this Court in *Anderson v. United States,* 205 F. 2d 326. The *Anderson* case cited *Dismuke v. United States,* 297 U. S. 167, in which the Supreme Court ruled squarely that the United States Dis-

trict Court has jurisdiction in this type of case. The Supreme Court there said:

> "We conclude that annuities payable under the Retirement Act are not pensions within the meaning of the Tucker Act and that suits against the Government to recover them are within the jurisdiction of the district courts, is not precluded, as the court below held they are, by the administrative provisions of the language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence. *Siberschein v. United States,* 266 U. S. 221; *United States v. Williams,* 278 U. S. 255, or by failing to follow a procedure which satisfied elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which Congress has authorized, *Lloyd Sabaudo Secieta Anomina v. Elting,* 287 U. S. 329, but the power of the administrative officer will not in the absence of plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administratrive officer, is entitled, *United States v. Laughlin,* 249 U. S. 440; *United States v. Hooslep,* 237 U. S. 1; *McLean v. United States,* 226 U. S. 378. The Commissioner is required by Section 13 'upon receipt of satisfactory evidence of the character specified "to adjudicate the claim." ' This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it."

This Court noted in the *Anderson* case that the Supreme Court in the *Dismuke* case referred to the claimant's rights as a "statutory right" and a "statutory benefit." In ruling for the annuitant-claimant, the Court further said:

> "The rule stated assumes that the right exists if, at all, prior to and independently of any administrative action upon it."

The Failure to Act on Appellee's Request for Retirement Was Based Upon an Error of Law—Not an Error of Fact.

The Supreme Court in the *Dismuke* case had a problem similar to the one at bar. There the question arose as to whether the plaintiff was or was not an employee of the United States. The Court said:

> "The administrative decision thus turned upon a question of law, whether a field deputy marshal during the period from December 16, 1895, to December 30, 1902, was an employee of the United States. The Administrative determination of that question is open to review in the present suit, and should have been considered and decided by the Court below." (297 U. S. 172, 173.)

If such a determination raises a question of law, certainly the right of the Secretary of the Treasury to use a classification which automatically prohibits an applicant's retirement raises a question of law.

As previously pointed out whatever rights Appellee had existed prior to the determination made by the Treasury and Civil Service officials. As this Court said in the *Anderson* case:

> "Inaction or denial of the claim by the Commission could not delay or defeat the right, and favorable

adjudication, evidenced by issuance of an annuity certificate, could only formally acknowledge a right already established."

In the *Anderson* case a widow's estate was refused an annuity payment because the widow died before the administrative officials had gotten around to the issuance of a check. On the question of the time at which the widow's rights became fixed this Court said:

"The Court below was of the view that the annuitant can have no right to the annuity until the claim is *adjudicated* by the Commission and a certificate issued. We do not agree. When the annuitant has filed a proper application he has done all that he is required to do. The right must accrue at that time. Cf. *Ewing v. Gardner,* 6 Cir., 185 F. 2d 781, affirming D. C. 88 F. Supp. 315, modified without discussion of this point, 341 U. S. 321, 81 S. Ct. 684, 95 L. Ed. 968. The same Court which rendered the Opinion in *Adams v. Ernst,* supra, on which the Court below and Appellee relied, has held that the right to a statutory gratuity vests at the time satisfactory application is made therefor. *Conant v. State,* 197 Washington 21, 84 P. 2d 378; see also *Finley v. Marion Co.,* 81 Or. 294, 159 P. 557.

If there be doubt as to this construction of the Act, we might consider where the construction urged by Appellee would lead us. Taking the view that the right of an annuitant is conditional upon the Commissioner's *adjudication* of his claim, what would be the effect of a wrongful denial of that claim by the Commission? The answer must be that the annuitant could have no right to the annuity in such event, for the condition would hardly be satisfied by an adjudication that the claim is invalid. And to ac-

cept this argument we must be prepared to say that on claims made under the Act the decision of the Commission is final; for if no right can be asserted by an annuitant after an adverse decision by the Commission, it is the Commission which has the first and last say.

The argument cannot be maintained. On the assumed facts there is no doubt that had Mrs. Anderson lived, and had the Civil Service Commission denied her claim, she could have successfully prosecuted an action for the annuity in the Courts."

This Court had no difficulty in deciding that the administrative determination in the *Anderson* case was based on an error of law which gave the District Court jurisdiction. And so it is here. The administrative officials misinterpreted the provisions of Section 1(d) and used a classification instead of individual consideration of eligibility in rejecting Appellee's application for retirement.

Summary of Judgment.

Appellee, who at the time of application for retirement was over 50 years of age, had rendered more than 20 years of service in a position whose duties were primarily the investigation of persons suspected of offenses against the criminal laws of the United States. Furthermore, he was subjected to a degree of hazard in the performance of his duties contemplated by Section 1(d) and should have been retired under that section upon his request. The refusal of the Secretary of the Treasury and the Civil Service Commission to grant such requirement was based solely upon the reason that Appellee was not in a class of position listed under the heading "Internal Revenue Service positions covered by Section 1(d)

Retirement Act." No consideration was given to Appellee's personal qualifications for retirement under Section 1(d) nor did the officials consider the degree of hazard to which Appellee had been subjected. On the contrary, these officials based the refusal for retirement on "the general duties of the class of the position" held by Appellee, contrary to the provisions of Section 1(d). The refusal of the Secretary of the Treasury and the Civil Service Commission to retire Appellee was based upon an erroneous interpretation of the statute. It is therefore submitted that the trial court correctly decided that Appellee was entitled to a money judgment in the sum of $760.00.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

ERNEST R. MORTENSON,

Attorney for Appellee.